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No. 78-1840

In the Supreme Court of the United States

OCTOBER TERM, 1978

CITY OF ROME, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE APPELLEES

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OPINIONS BELOW

The district court's opinion of February 22, 1978, reproduced at J.S. App. 1a-15a, is reported at 450 F. Supp. 378.[1] The court's order of April 4, 1979, is reproduced at J.S. App. 1b-2b. The court's opinion of April 9, 1979, reproduced at J.S. App. 3b-59b, is reported at 472 F. Supp. 221.

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[1] "J.S. App." refers to the appendix to the Jurisdictional Statement. "A." refers to the separately bound appendix to the briefs filed in this Court.

JURISDICTION

The orders of the three-judge court, convened pursuant to 42 U.S.C. 1973b(a) and 1973c, were entered on February 22, 1978 (J.S. App. 1a) and April 4, 1979 (*id.* at 1b). Notice of appeal was filed on May 2, 1979 (*id.* at 1f), and the jurisdictional statement was filed on June 7, 1979. This Court noted probable jurisdiction on July 2, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1253 and 42 U.S.C. 1973b(a) and 1973c.

QUESTIONS PRESENTED

1. Whether the district court erred in holding that Section 5 of the Voting Rights Act of 1965 permits only those electoral changes that do not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, and in concluding that the changes at issue would have a discriminatory effect.

2. Whether the district court erred in holding that Section 4(a) of the Voting Rights Act of 1965 does not permit a municipality in a state covered by Sections 4(a) and 5 to file an independent action to exempt itself from coverage of the Act.

3. Whether this Court should overrule its prior decisions holding that Section 5 of the Voting Rights Act, which requires federal preclearance of new voting procedures enacted by certain jurisdictions, is a proper exercise of Congress' power to enforce the guarantees of the Fifteenth Amendment.

4. Whether the district court erred in concluding that the electoral changes and annexations at issue here have not been precleared by the Attorney General.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Fifteenth Amendment to the United States Constitution provides as follows:

> Section 1. The right of the citizens of the United States to vote shall not be denied or abridged by the United States or any State on account of race, color, or previous condition of servitude.
>
> Section 2. The Congress shall have power to enforce this article by appropriate legislation.

2. Sections 4 and 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973b and 42 U.S.C. 1973c, are reproduced at J.S. App. 1c-9c.

3. The changed electoral procedures in the Charter of the City of Rome at issue here—1966 Ga. Laws 2375-2378, 2382-2386, 2815-2819, 3083-3087; 1967 Ga. Laws 3296-3298; 1970 Ga. Laws 2563-2566; 1971 Ga. Laws 3664-3666—are reproduced at J.S. App. 1e-27e.

4. Other provisions of the Georgia Municipal Election Code, which were precleared by the Attorney General—Ga. Code Ann. § 34A-102 (1970); Ga. Code Ann. § 34A-902 (1970); Ga. Code Ann. § 34A-1407 (1978)—are reproduced at J.S. App. 1d-3d.

STATEMENT

A. Electoral Practices in the City of Rome

In 1970, the City of Rome, located in Floyd County, Georgia, had a population of 30,759, and its racial composition was 76.6% white and 23.4% black (J.S. App. 4b). The City elects its City Commission and Board of Education, and in 1975 blacks comprised about 15.5% of the registered voters (*ibid.*). There has never been a black elected to any political office in the City, and only four black persons have ever sought elective office (*id.* at 8b).[2]

From 1929 until 1966, Rome's City Charter established a nine-member City Commission, with each member elected from one of nine wards in the City (J.S. App. 4b). Elections were at-large and the winner needed only a plurality vote (*ibid.*). The charter also provided for a Board of Education consisting of five members elected concurrently and at large (*ibid.*).

In 1966 the General Assembly of Georgia enacted several laws of local application changing portions of

[2] Two of these—M.D. Whatley and Dr. John W. Houser, Jr. —ran unsuccessfully for the Board of Education in the 1950's and early 1960's, respectively; neither did well (J.S. App. 8b). The third, Samuel Stubbs, received only 79 out of 276 votes in his campaign in the 1972 Republican primary election for City Commission (*ibid.*). The fourth candidate was the Rev. Clyde Hill, who obtained a plurality of the votes in his quest for a seat on the Board of Education in 1970, but who lost the subsequent run-off election required by the 1966 amendments to the City's charter that are at issue in this case (*id.* at 9b).

the Rome charter relating to the election of the City Commission and Board of Education (J.S. App. 4b-5b).[3] Those laws changed the election of the City Commission as follows:

(a) the number of wards was reduced from nine to three (*id.* at 1e-4e);

(b) each of the nine commissioners was to be elected from one of the three numbered posts established within each ward (*id.* at 2e);

(c) the election of each commissioner was to be by majority vote; in the event that no candidate received a majority, a run-off would be held between the two candidates receiving the highest number of votes (*ibid.*); and

(d) the terms of the three commissioners from each ward would be staggered (*ibid.*).

The 1966 charter amendments changed the method of electing the Board of Education as follows:

(a) the Board was expanded from five to six members (*id.* at 10e);

(b) each member of the Board was to be elected at-large, by majority vote, for one of two numbered posts in one of the three wards, with run-off procedures identical to those passed for City Commission elections (*id.* at 10e-11e);

[3] While cities in Georgia have some home rule powers, changes in the electoral process can be made only by the state legislature. Thus, the charter changes at issue in the present case are laws of the State of Georgia. Ga. Code Ann. § 69-1018 (1976).

(c) each member of the Board was required to reside in the ward from which he or she was elected (*id.* at 10e); and

(d) the terms of the two members from each ward were staggered (*id.* at 11e).

In addition to these changes in the manner of electing the City Commission and the Board of Education, the City annexed 60 different areas between November 1, 1964, and February 10, 1975 (*id.* at 5b).

In 1968 the Georgia legislature enacted a comprehensive Municipal Election Code that permitted municipalities to continue to use majority voting with run-off elections and numbered posts where their local charters already contained such provisions (J.S. App. 23b-24b). This code was submitted to the Attorney General as required by Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c,[4] and

[4] The criteria for determining whether a state or political subdivision thereof is required to submit electoral changes to the Attorney General for preclearance under Section 5 are identified in Section 4(b) of the Act, 42 U.S.C. 1973b(b), which is applicable to any State or any political subdivision of a State which—

> * * * (1) the Attorney General determines maintained on November 1, 1964, any test or device [designed to condition registration or voting on literacy, education, moral character, or approval of other persons], and with respect to which (2) the Director of Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1964, or that less than 50 per centum of such persons voted in the presidential election of November 1964.

The State of Georgia was designated a covered jurisdiction under this provision in 1965 (30 Fed. Reg. 9897), and by virtue of that designation, its municipalities—including the City of Rome—are obligated to comply with the preclearance requirements of Section 5 (J.S. App. 13b-14b n.43).

he precleared it (J.S. App. 23b). However, the specific electoral changes made two years earlier in the Rome City Charter were not submitted for preclearance prior to their implementation, and did not come to the Attorney General's attention until 1975 (A. 126-138).

The first, and thus far the only, black candidate to seek office in Rome following implementation of the 1966 charter amendments was the Rev. Clyde Hill, who ran for a position on the Board of Education in 1970 (J.S. App. 9b). Rev. Hill conducted a strong campaign against three white opponents and received a plurality of the votes cast in the general election (*ibid.*; A. 77). But under the 1966 changes he was required to enter a run-off election because he had not received a majority of the votes, and in the run-off he was defeated (J.S. App. 9b; A. 79).[5]

[5] In the 1970 general election for school board representative from Ward 2, Post 2, the following numbers of ballots were cast (A. 77):

Rev. Clyde Hill, Sr.	921
Dr. Sara L. Hoyt	909
Jean V. Anderson	407
Rev. Warren L. Jones	143
TOTAL	2380

In the run-off election between Rev. Hill and Dr. Hoyt, a total of 2,551 ballots was cast; Rev. Hill received 1142 votes, and Dr. Hoyt received 1409 votes (A. 79).

On the basis of Rev. Hill's experience, members of the City's black community have concluded that it is impossible for a black candidate to be elected under the majority vote requirement now in effect (J.S. App. 9b-10b & nn.32-33).[6] Widespread black apathy resulted (*id.* at 9b),[7] and qualified blacks will not run for office because they believe they cannot obtain the necessary majority to be elected, given the existence of racial bloc voting in Rome (*id.* at 10b & n.34).[8]

While conclusive statistical proof of racial bloc voting in Rome is unavailable (J.S. App. 10b-11b n.36; A. 366-373 (Deposition of Dr. James W. Loewen)), the general belief among black voters is that, given a choice, voters in Rome will cast their ballots

[6] See also A. 254 (Deposition of C.W. Aycock); A. 323, 326-327 (Deposition of Curtis Moreland); A. 337 (Deposition of E.J. Thomas, Jr.); A. 342 (Deposition of Napoleon Fielder); A. 348 (Deposition of Rev. Clyde Hill).

[7] See also A. 254, 258 (Deposition of C.W. Aycock); A. 274 (Deposition of Donald Jackson); A. 293, 303 (Deposition of Joe Wright); A. 309 (Deposition of James Wright); A. 325-326 (Deposition of Curtis Moreland); A. 337 (Deposition of E.J. Thomas, Jr.); A. 342 (Deposition of Napoleon Fielder); A. 347 (Deposition of Rev. Clyde Hill); and A. 353 (Deposition of Elgin Carmichael).

[8] See also A. 249-255 (Deposition of C.W. Aycock); A. 283 (Deposition of Donald Jackson); A. 298 (Deposition of Joe Wright); A. 330-331 (Deposition of Curtis Moreland); A. 332-333 (Deposition of E.J. Thomas, Jr.); A. 352-353 (Deposition of Elgin Carmichael).

for candidates of their own race (*id.* at 11b n.37).[9] Supporting that perception are the election statistics from Rev. Hill's 1970 school board campaign. After gaining a plurality in the general election (A. 77), Rev. Hill received only 221 additional votes in the run-off, while his white opponent gained an additional 500 votes (A. 79). Given the additional fact that 171 more votes were cast in the run-off than in the general election, the likely inference is that bloc voting by the white community caused Rev. Hill's defeat (J.S. App. 12b).

Dr. James W. Loewen, a professor of sociology who testified as an expert witness for the United States, provided further evidence of racial bloc voting in Rome and surrounding Floyd County. Dr. Loewen analyzed election data for the 1968 Democratic primary race for the United States Senate and concluded that in that election at least 88.9% of the white voters in Floyd County voted for the white incumbent, Herman Talmadge, while at least 76.2% of the county's black voters cast their ballots for the black candidate, Maynard Jackson (J.S. App. 12b; A. 355-364). Dr. Loewen stated he was confident that

[9] See also A. 252-253 (Deposition of C. W. Aycock); A. 274-275 (Deposition of Donald Jackson); A. 294 (Deposition of Joe Wright); A. 310 (Deposition of James Wright); A. 323-324 (Deposition of Curtis Moreland); A. 352 (Deposition of Elgin Carmichael). This belief in the existence of racial bloc voting in Rome was disputed by local white officials (J.S. App. 11b n.39), but objective evidence of bloc voting by whites and blacks in Rome and in Floyd County was presented in the deposition of Dr. James W. Loewen. See note 19, *infra*.

the bloc voting patterns in Rome were consistent with those in the County over-all in that primary—particularly racial bloc voting among the white citizens of Rome (A. 364, 373).

B. Procedural History

On June 13, 1974, the Rome City Attorney submitted one annexation by the City for preclearance as required by Section 5 of the Voting Rights Act (A. 107-116). When the Assistant Attorney General for the Civil Rights Division discovered that other annexations had occurred, he asked the City on July 24, 1974, to make the additional submissions required by Section 5 (A. 117-119).[10] Nearly seven months later, on February 7, 1975, the City submitted a partial response (A. 119-120); following another request from the Assistant Attorney General on March 6, 1975 (A. 121-123),[11] the City sent its complete submission of the annexations on May 28, 1975 (A. 126-131). In response to an earlier inquiry in the Assistant Attorney General's letter of March 6, 1975 (A. 122-123), the City acknowledged in its May 28 letter that "the number of wards and the method of electing members to the Rome City Commission and the Rome Board of Education was changed in 1966 by legislative act" (A. 127).

[10] The date on this letter was omitted in the copy reproduced at A. 117-119; the record indicates that the letter was dated July 24, 1974.

[11] The date on this letter was omitted in the copy reproduced at A. 121-123; the record indicates that the letter was dated March 6, 1975.

On August 1, 1975, the Assistant Attorney General, on behalf of the Attorney General, declined to preclear the annexations, stating that because the method of electing the City Commission and the Board of Education had not been precleared, these changes would have to be submitted for preclearance before the effects of the annexations could be evaluated (A. 131-133). On August 19, 1975, the City submitted the 1966 changes to its charter, and also asked the Attorney General to reconsider his decision on the annexations (A. 133-138).[12]

On October 20, 1975, the Assistant Attorney General declined to preclear the provisions for majority vote, numbered posts, and staggered terms for City Commission and Board of Education elections, and the residency requirement for the Board of Education elections, concluding that in a majority white city like Rome, those voting changes would eliminate the opportunity for black voters to elect a candidate of their choice (A. 139, 140-141). The Assistant Attorney General withdrew his objection to 47 of the 60 annexations submitted by the City, finding that the areas either were not populated or had populations so small that the annexations would have at most "a *de minimis* effect on minority voting strength" (A. 141-142). He refused, however, to preclear the remaining 13, which either contained predominantly white populations of significant size or apparently were near such areas and were zoned for residential

[12] Minor changes enacted in 1967, 1970, and 1971 (J.S. App. 19e-27e) were also submitted at that time.

subdivision development; he explained that, given Rome's at-large method of electing city officials and the evidence of racial bloc voting in Rome, he could not conclude that these 13 annexations would not dilute the black vote (A. 142-143, 127-131).[13]

On May 21, 1976, the City asked the Assistant Attorney General to reconsider his disapproval of all disapproved aspects of the Section 5 submission (A. 143-154), and on July 13, 1976, the City provided additional data in support of that request (A. 155-159). On August 12, 1976, the Assistant Attorney General advised the City that he would not alter most of his prior determinations (A. 159-160). With respect to the 13 annexations, he stated that because his refusal to preclear the 1966 changes in school board elections revived the pre-existing plurality vote requirement, the annexations posed no problem for school board elections conducted under the pre-1966 procedures (A. 161). But because the pre-1966 City Commission election procedures contained a residency requirement, the Assistant Attorney General concluded that the 13 annexations could have a discriminatory impact if the City reverted to its former method of electing city commissioners, so the

[13] The Assistant Attorney General also pointed out that if the City undertook to use its former plurality-win method of electing the City Commission and the Board of Education or altered its procedures to elect them from fairly drawn single-member districts, he would reconsider his determination as to the 13 annexations in question (A. 142-143).

objection to the annexations on that basis remained (*ibid.*).[14]

On May 9, 1977, the City and two of its officials filed suit in the United States District Court for the District of Columbia against the United States, the Attorney General, and the Assistant Attorney General (A. 6). The plaintiffs sought a declaratory judgment that (1) the City was not covered by Section 5 of the Voting Rights Act; (2) Section 5 was unconstitutional; (3) the Attorney General enforced Section 5 in an unconstitutional manner; and (4) the changes submitted for Section 5 review were enforceable either because they had already been precleared, or because the Attorney General had failed to make a timely response to the City's request for reconsideration of its Section 5 submission (J.S. App. 16b-17b). The City also argued that it was entitled under Section 4(a) of the Act to be exempted—to "bail out"—from the coverage of Sections 4 and 5 (*ibid.*). A three-judge court, convened pursuant to 42 U.S.C. 1973b(a) and 1973c, rejected these claims, granting summary judgment for the

[14] In his August 12, 1976, letter the Assistant Attorney General also pointed out that since his continued objection to the 1966 charter amendments "renders the majority vote requirement numbered posts and residency requirement for Board of Education elections legally unenforceable the necessary effect of that objection is a reversion to the previously existing simple plurality-win system" (A. 160-161). The Assistant Attorney General also stated that he understood that the August elections for the City Commission and the Board of Education had been postponed, and he requested further information as to the City's intentions with respect to future primaries or elections (A. 161).

defendants on April 4, 1979 (*id.* at 1b-2b).[15] On May 2, 1979, the City and the individual plaintiffs filed a notice of appeal to this Court (*id.* at 1f-2f), and this Court noted probable jurisdiction on July 2, 1979.

C. The District Court's Decision

In declining to grant the requested relief, the district court first rejected the City's contention that it could invoke the declaratory judgment procedure of Section 4(a) of the Voting Rights Act to "bail out" from the coverage of Section 5 (J.S. App. 17b-23b). The court noted that Section 4(a) prohibits certain entities covered by Section 4(b) from using tests or devices as prerequisites for voting and subjects those entities to the preclearance requirements of Section 5 (*id.* at 17b-18b). Section 4(a) permits those same entities to exempt themselves from the requirements of Section 5 and other portions of the Act, if they can prove they have not used tests or devices for discriminatory purposes or with discriminatory effect for seventeen years. The court pointed out that by its terms the Act applies the "test or device" formula of Section 4(b) to two types of jurisdictions: an entire state, or a "political subdivision with respect

[15] In an earlier opinion issued February 22, 1978 (J.S. App. 1a-15a), the district court dismissed the City's claim that by failing to hold hearings or make findings on the Section 5 submission, the Attorney General had applied Section 5 in an unconstitutional manner. The court held that the Attorney General's method of reaching his administrative determination on a Section 5 submission is not subject to judicial review (*id.* at 4a-7a).

to which such determinations [that it qualified under the formula for coverage] have been made as a separate unit" (*id.* at 18b). These two entities are the only ones entitled by Section 4(a) to "bail out" (*ibid.*).

The court concluded that since the City had not been designated for coverage "as a separate unit," but was covered by virtue of its being part of a covered state—the State of Georgia—the City could not independently exempt itself from coverage (J.S. App. 18b-23b). In support of this interpretation of the statute, the district court cited express statements in the legislative history of the Voting Rights Act, revealing Congress' intent that where an entire state is covered, only that state—and not the separate municipalities within it—could exercise the option to exempt itself from coverage (*id.* at 20b-23b).

The court next rejected the City's claim that its electoral changes had previously been precleared by the Attorney General in 1968 (J.S. App. 23b-26b). The court ruled that in that 1968 submission, the Attorney General of Georgia did not "unambiguously" submit the specific changes made two years earlier in the City Charter, but submitted only a general state law that deferred to local option on certain electoral methods (*id.* at 25b-26b). The City's practices were not made an explicit part of the State's 1968 submission and therefore were not precleared when it was precleared (*ibid.*). The court also held that the Attorney General's August 12, 1976, denial of the City's request for reconsideration

of his prior objections was timely, since—in accordance with 28 C.F.R. 51.18(a)—it was mailed within 60 days of the City's voluntary submission of additional information on July 14, 1976 (*id.* at 27b-28b).

The court found that, as a three-judge court having jurisdiction over the claims arising under the Voting Rights Act, it had pendant jurisdiction over plaintiffs' challenges to the constitutionality of Section 5 (J.S. App. 30b-32b). On the basis of *South Carolina* v. *Katzenbach*, 383 U.S. 301 (1966), and subsequent decisions of this Court relying on it, the court rejected the City's claim that the enactment of Section 5 was beyond the power of Congress under the Fifteenth Amendment (J.S. App. 29b-30b, 32b-37b). In rejecting the City's claim that Section 5 violates principles of federalism (*id.* at 38b-42b), the court held that *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), on which the City principally relied, was inapposite since it involved the exercise of congressional power under the Commerce Clause. The court also rejected the claims of the two individual plaintiffs that by preventing the City from holding regularly scheduled elections, Section 5 had deprived them of their right to vote (*id.* at 42b-44b). The court pointed out that the City could have conducted elections using the pre-1966 procedures, and that the Attorney General had agreed to clear any technical changes necessary to permit elections under those procedures (*id.* at 42b-43b & n.79). The court also held that a delay in elections as a result

of the application of Section 5 is not unconstitutional since Section 5 is a narrowly drawn means of insuring that elections are free of racial discrimination (*id.* at 43b-44b).

Finally, on the merits the district court held that while none of the electoral changes or annexations at issue was intentionally discriminatory (J.S. App. 47b), the voting changes—particularly the new majority-vote requirement—would effectively eliminate the possibility, which existed under the old plurality system, that black voters in Rome could elect the candidate of their choice (*id.* at 47b-49b). The court also concluded that, given the existence of racial bloc voting and the residency requirement for City Commission candidates, it could not approve the 13 annexations (*id.* at 57b-58b).[16]

SUMMARY OF ARGUMENT

I

The language and legislative history of Section 5 of the Voting Rights Act of 1965, as well as this Court's decisions construing and applying it, make it clear that Section 5 prohibits changes in electoral procedures by a covered jurisdiction if it is not shown that the changes will not have the effect of

[16] The court dismissed the City's claim as to the annexations without prejudice to its renewal if the City abandoned the residency requirement for City Commission elections or took other effective measures to assure that black voters would have a fair opportunity to obtain representation reasonably commensurate with their post-annexation voting strength (J.S. App. 59b).

abridging or denying the right to vote on account of race or color. Proof that such changes were not enacted with a discriminatory purpose is an additional requirement for preclearance, not, as appellants contend, a sufficient basis for preclearance in itself. This settled interpretation has been the basis for thousands of preclearance determinations under Section 5 and it has been effectively ratified by Congress in its extensions of Section 5 in 1970 and 1975.

Applying Section 5 as thus construed, the district court correctly denied preclearance of the City's charter amendments and annexations because the City failed to show that they would not have the effect of abridging the voting rights of its black citizens.

In the context of an at-large system with a majority white population, the adoption of a majority-vote requirement, numbered posts, and staggered terms for City Commission and Board of Education elections, in conjunction with bloc voting by race, effectively precluded the City's black voters from the possibility of electing a candidate of their choice. This represented a distinct retrogression in the potential voting strength of the City's black citizens, because under the pre-1966 procedures they had the mathematical potential to elect a candidate of their choice.

The annexations, comprising areas in which both the total population and its component of registered voters were overwhelmingly white, were impermissible under Section 5 so long as the City declined to

make appropriate adjustments in its electoral procedures that would assure to blacks in the City "representation reasonably equivalent to their political strength in the enlarged community." *City of Richmond* v. *United States*, 422 U.S. 358, 370 (1975). Appellants failed to show that the electoral changes at issue would not represent a retrogression in the potential voting strength of the City's black voters.

II

The City cannot exempt itself from the preclearance requirements of the Voting Rights Act by filing a "bail-out" suit under Section 4(a). Congress intended to make that option available only to "covered" states and those political subdivisions that are covered by virtue of separate determinations that they come within the coverage formula of Section 4(b). The legislative history of the Act includes an express disavowal in the committee reports in both Houses of any intent to extend this option to subdivisions within a state covered in its entirety. This congressional intent is also implicit in the general scheme of the Act whereby Section 5 preclearance determinations—which could be expected to be, and have been, numerous—may be made either administratively, by the Attorney General, or judicially, in a suit filed in the United States District Court for the District of Columbia, while Section 4(a) exemption determinations may be made only in a suit filed in that judicial forum. Under appellants' construction of Section 4, the potential number of bail-out suits

would be in the thousands, a consequence Congress obviously did not intend.

This Court's decision in *United States* v. *Board of Commissioners of Sheffield, Alabama*, 435 U.S. 110 (1978), did not address the bail-out provision, but to the extent that it recognizes the intent of Congress to avoid splintering the Act's coverage of electoral procedure changes in a covered state, it supports the analysis of the district court in holding that the City could not be separately exempted under Section 4 (a), rather than the contrary contentions of appellants.

III

Appellants' challenges to the constitutionality of Section 5 as construed by the district court are essentially the same as arguments rejected by this Court in *South Carolina* v. *Katzenbach*, 383 U.S. 301 (1966). Subsequent decisions of this Court concerning the Voting Rights Act and Section 2 of the Fifteenth Amendment reaffirm this Court's initial determination that Section 5 was an appropriate exercise of power under Section 2 of the Fifteenth Amendment and that it does not intrude on rights granted to the States and their citizens under other provisions of the Constitution.

1. Appellants contend that Congress lacks power under Section 2 of the Fifteenth Amendment to prohibit changes in electoral procedures that have discriminatory effects where there is no proof of purposeful discrimination in their enactment. This is so, they argue, because Section 1 of the Fifteenth

Amendment condemns only purposeful discrimination and because Congress may not, under Section 2, prohibit practices that do not violate Section 1. Appellants' argument is erroneous on at least two grounds. First, three decisions of this Court concerning the Voting Rights Act make it clear that Congress may prohibit such changes pursuant to its powers under Section 2 of the Amendment, whether or not those changes are, in themselves, constitutional violations. There need be only a basis on which Congress might reasonably have concluded that there is a risk that such changes might be made for discriminatory purposes and that a prophylactic rule is warranted. *South Carolina* v. *Katzenbach*, *supra*; *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966); *Oregon* v. *Mitchell*, 400 U.S. 112 (1970). Congress made that determination anew in 1975, when it concluded that despite progress made under the Voting Rights Act in the preceding decade, a seven-year extension of Section 5 of the Act was warranted to assure that the gains made under the Act by racial minorities would not be extinguished as jurisdictions resorted to new measures to dilute minority voting strength.

In any event, construing Section 5 of the Act to prohibit the changes at issue here would not render it unconstitutional even assuming that Congress is restricted under Section 2 of the Fifteenth Amendment to prohibiting and remedying constitutional violations and that the Fifteenth Amendment by itself reaches only purposeful discrimination. The changes at issue here were enacted by a governmental entity

and they enhance the power of purposeful private discrimination, in the form of bloc voting by the white majority, to exclude blacks from participation in the electoral process. Construing the Fifteenth Amendment to prohibit such official action is consistent with decisions of this Court. *Terry* v. *Adams*, 345 U.S. 461 (1953); *Smith* v. *Allwright*, 321 U.S. 649 (1944).

2. The Voting Rights Act is not, as appellants contend, an unconstitutional invasion of state sovereignty or an infringement of the rights of private citizens. The Fifteenth Amendment by its very terms prohibits certain conduct by the States, and as legislation appropriate to enforce it, the Voting Rights Act of necessity intrudes on the pertinent areas of state activity. The contention of the individual appellants that they are being unconstitutionally deprived of their voting rights by the application of Section 5 to the electoral changes at issue is without merit. Section 5 does not prevent municipalities from conducting elections or citizens from voting in them; it simply helps to insure that when elections are held, members of any particular racial group will not be deprived of an opportunity for full participation equal to that enjoyed by members of other racial groups. The City has been free to hold elections, but has chosen not to do so.

IV

1. The district court correctly rejected appellants' contention that the Attorney General effectively precleared the 1966 changes in the City's charter when

he precleared the Municipal Election Code enacted by the State of Georgia in 1968 (Ga. Code Ann. §§ 34A-101 *et seq.* (1970)). In the submission of that Code for preclearance in 1968, it was not made apparent what impact it would have on particular municipalities such as the City of Rome, so its application to the City could not have been precleared. In any event, the 1968 Code made no changes in the City's electoral procedures, but merely permitted the City to retain procedures it had adopted in 1966.

2. The district court also correctly held that, under the Attorney General's reasonable interpretation of his own regulations, he gave a timely response to the City's request for reconsideration of the changes to which he had previously interposed timely objections. In any event, even if the Attorney General had not timely complied with the regulations governing requests for reconsideration, the effect would not have been to preclear the proposed changes. The regulations state only that the Attorney General will make his decision on reconsideration and notify the requesting authority within 60 days. Nothing in either the regulations or the Voting Rights Act provides that a timely objection by the Attorney General will be deemed withdrawn if he fails to respond to a request for reconsideration within a given time. A failure by the Attorney General to respond within the time prescribed by his regulations might have entitled appellants to a court order requiring a prompt response, but there is no basis for holding that it would have abrogated the protections of the Act.

ARGUMENT

I. UNDER SECTION 5 OF THE VOTING RIGHTS ACT THE DISTRICT COURT PROPERLY DISAPPROVED THE ELECTORAL CHANGES AND ANNEXATIONS AT ISSUE HERE BECAUSE THEIR EFFECT WOULD BE TO ABRIDGE THE RIGHT TO VOTE ON ACCOUNT OF RACE OR COLOR

A. In A Covered Jurisdiction, Section 5 Of The Voting Rights Act Permits Only Those Changes In Electoral Procedures That Do Not Have The Purpose And Will Not Have The Effect Of Denying Or Abridging The Right To Vote On Account Of Race Or Color

Appellants first argue that because the electoral changes and annexations at issue here were enacted without discriminatory purpose, they are not prohibited by Section 5 of the Voting Rights Act (Br. 24-38).[17] In so doing they ask this Court to construe Section 5 to impose a less stringent standard than that dictated plainly and unambiguously by its own terms, and to depart from this Court's settled interpretation of Section 5—an interpretation that is consistent with the statute's plain meaning and that has been ratified by Congress in its reenactments of the Voting Rights Act.

[17] As noted at page 6, note 4, *supra*, the obligation of complying with the preclearance requirements of Section 5 is triggered by the coverage formula of Section 4(b), 42 U.S.C. 1973b(b). Appellants concede that by virtue of the State of Georgia's designation as a covered jurisdiction in 1965, the City of Rome is bound to comply with Section 5 (Br. 24-25), abandoning their contrary claim made in the district court (A. 26-27).

Section 5 provides that in a declaratory judgment suit brought by a covered jurisdiction to obtain judicial preclearance of a change in election procedures, the district court can approve such a change only upon finding that it "does not have the purpose *and* will not have the effect of denying or abridging the right to vote on account of race or color" (42 U.S.C. 1973c) (emphasis added)). The use of the conjunction "and" requires that plaintiffs prove not only an absence of discriminatory intent, but also an absence of discriminatory impact before the court can permit the electoral change to be implemented. If Congress had intended that a finding of a lack of invidious purpose would suffice for approval of a change in electoral procedures—the construction urged by appellants—it presumably would have used the conjunction "or" instead of "and." [18]

[18] Appellants' explanation (Br. 26) of how the references to "purpose" and "effect" in Section 5 should be construed and applied by a court in a preclearance suit is unsound also because it ignores the fact that the statute defines the matters to be proven in the negative, clearly placing on the plaintiff the burden of proving their absence. *South Carolina* v. *Katzenbach*, 383 U.S. 301, 335 (1966). Appellants argue that when a court finds that direct evidence of purpose (other than "effect" evidence) leaves it unclear whether discriminatory purpose exists, the court should look to "effect" to see "if it calls for an inference of 'purpose'" (*ibid.*). Under the Act's terms, however, if the evidence is insufficient to prove that the changes at issue "do not have the purpose" of "denying or abridging the right to vote on account of race or color," the court must deny preclearance whether or not additional evidence in the form of an inference from effect tends to prove discriminatory purpose.

This Court's interpretation of the requirements of Section 5 has been fully consistent with the plain meaning of that provision. In *City of Richmond* v *United States*, 422 U.S. 358 (1975), the Court reviewed a declaratory judgment action seeking Section 5 approval of an annexation. The Court conducted a two-part analysis of the proposed annexation. First (*id.* at 367-372), it explained and applied the "principles" that "govern the application of § 5 insofar as it forbids changes in voting procedures having the effect of denying or abridging the right to vote on the grounds of race or color" (*id.* at 372); the Court concluded that the annexation would not have the proscribed effect and that preclearance could therefore not be denied on that ground. The Court then observed (*ibid.*) that Section 5 "also proscribes changes that are made with the purpose of denying the right to vote" on account of race or color. It determined that the lower court's findings on purpose were incomplete, and remanded the case for such findings so that it could be decided whether the annexation was forbidden by Section 5 on the independent ground that, whatever its effects might be, it had been devised for "the purpose of denying the vote on the grounds of race or color." *Id.* at 378. In sum, in *City of Richmond*, this Court expressly recognized that Section 5 imposes a dual requirement for preclearance of voting changes: they must be free of discriminatory purpose and they must be free of discriminatory effect. See also *Beer* v. *United States*, 425 U.S. 130, 141 (1976); *Georgia* v. *United*

States, 411 U.S. 526, 531, 538-539 (1973); *Perkins* v. *Matthews*, 400 U.S. 379, 387, 388 (1971); *City of Petersburg* v. *United States*, 354 F.Supp. 1021, 1027-1028 (D.D.C. 1972), aff'd, 410 U.S. 962 (1973).

Moreover, Congress has ratified that reading of the Act by extending the Voting Rights Act for a second time in 1975, when the construction placed on Section 5 by the Attorney General and this Court was clear and well established. Indeed, the House and Senate Reports both refer, with approval, to this Court's decision in *Perkins* v. *Matthews*, *supra*, and themselves describe Section 5 in terms that recognize its imposition of dual requirements. S. Rep. No. 94-295, 94th Cong., 1st Sess. 15, 16 (1975); H.R. Rep. No. 94-196, 94th Cong., 1st Sess. 9 (1975). See also H.R. Rep. No. 91-397, 91st Cong., 1st Sess. 8 (1969) (regarding 1970 extension).

Appellants argue that this well-settled understanding of Section 5 must be discarded because the Fifteenth Amendment forbids only purposeful discrimination, and in enacting legislation such as Section 5 to enforce the Fifteenth Amendment, Congress could not prohibit voting practices devoid of discriminatory purpose although discriminatory in effect (Br. 26, 46-48). As we explain in point III (pages 50-59, *infra*), this unduly narrow view of Congress' powers under the enforcement sections of the Civil War Amendments was rejected by this Court in *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966) and *Oregon* v. *Mitchell*, 400 U.S. 112 (1970), and appellants advance no sound reason for overruling those decisions.

B. The Record Sustains The District Court's Determination That The 1966 Electoral Changes And Annexations In Rome Would Have The Effect Of Abridging The Right To Vote By Effectively Preventing Black Citizens From Electing A Candidate Of Their Choice

Assuming arguendo that a failure to prove lack of discriminatory impact suffices under Section 5 to invalidate an electoral change, appellants next challenge the district court's conclusion that the City failed to show that the 1966 charter amendments and annexations would not impermissibly dilute black voting strength in Rome. That challenge must fail. The record contains ample evidence supporting the district court's finding of dilution, and the court therefore properly held that the City had failed to carry its burden of proof that the changes at issue would not have the effect of denying or abridging the right to vote on account of race or color.

Legal principles relevant to the determination whether a particular electoral practice or annexation dilutes the voting strength of a particular group are set out in *White* v. *Regester*, 412 U.S. 755 (1973), in which this Court affirmed the findings of a three-judge district court that electoral procedures in two Texas counties unconstitutionally abridged the voting rights of black and Hispanic citizens. That case involved a finding of purposeful discrimination in violation of the Fourteenth Amendment, but the Court's description of the evidence probative of unconstitutional dilution applies, a fortiori, to dilution determinations under Section 5 of the Voting Rights Act, since discriminatory effect alone will bar preclearance

of a changed procedure. In *White* v. *Regester*, *supra*, 412 U.S. at 766, this Court explained that impermissible dilution exists where the evidence shows "that the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice." In the context of a Section 5 evaluation, the standard to be applied is whether the change will enhance, leave undisturbed, or set back a racial group's access to the political process. As this Court pointed out in upholding under Section 5 a reapportionment in New Orleans in *Beer* v. *United States*, *supra*, 425 U.S. at 141 (footnote omitted):

> When it adopted a 7-year extension of the Voting Rights Act in 1975, Congress explicitly stated that "the standard [under § 5] can only be fully satisfied by determining on the basis of the facts found by the Attorney General [or the District Court] to be true whether the ability of minority groups to participate in the political process and to elect their choices to office is *augmented, diminished, or not affected* by the change affecting voting * * *." H.R. Rep. No. 94-196, p. 60 (emphasis added). In other words the purpose of § 5 has always been to insure that no voting-procedure changes would be made that would lead to retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.

The district court correctly applied these principles in concluding here that the 1966 charter amendments would diminish the effective exercise of the franchise by Rome's black citizens. Its finding of diminution of black voting strength was based on the combined effect of racial bloc voting in Rome (J.S. App. 11b-13b)[19] and the change from plurality-win to majority-

[19] Appellants contest the district court's finding of racial bloc voting (Br. 35-37), but the only evidence they offered below to demonstrate its absence was the testimony of white city officials, whom the district court appropriately termed "interested witnesses" (J.S. App. 12b). The perception of the black witnesses was virtually unanimous as to the existence of bloc voting along racial lines (J.S. App. 11b), and while it is true that Rev. Hill must have received some white votes in his unsuccessful school board run-off election (Br. 36), it is nonetheless likely—as the district court found (J.S. App. 12b)—that Rev. Hill's defeat in that election was caused by white electoral support for his white opponent.

Appellants also disparage the district court's reliance on evidence presented by the United States' expert witness, Dr. James Loewen (Br. 36-37). Dr. Loewen testified concerning bloc voting in Floyd County, Georgia—in which Rome is the largest city—in the 1968 Democratic primary election for United States Senate. Quoting Dr. Loewen's deposition testimony out of context and citing not to the deposition itself but to their own brief in response to the United States' motion for summary judgment, appellants imply (Br. 36) that Dr. Loewen had no fixed opinion about the existence of racial bloc voting in the City of Rome. But the very next sentence of Dr. Loewen's testimony—omitted by appellants—expresses his belief on the basis of his study of Floyd County that bloc voting in Rome was likely (Loewen Deposition at 50): "My prediction based on this analysis is that there would be racial bloc voting." Earlier in his deposition he explained in some detail why his conclusions as to the pattern of racial bloc voting in the County indicated that such patterns existed in

win elections, numbered posts, and staggered terms —all in the context of Rome's majority white population and the at-large system that predated the 1966 amendments (J.S. App. 47b-49b).[20] The district court summarized the dilutive impact of the 1966 changes as follows (J.S. App. 47b-48b) (footnotes omitted):

> With respect to the majority vote and runoff election provisions, the discriminatory effect is clear beyond peradventure. Under the plurality win system, a black candidate in Rome would stand a good chance of election if the white citizens split their votes among numerous candidates and the black voters engaged in "single-shot" voting, *i.e.*, voted only for the candidate or candidates of their choice. Under the majority vote/runoff election scheme, however, the black candidate, even if he gained a plurality of votes in the general election, would still have to face the runner-up white candidates in a head-to-head

the City of Rome as well (Loewen Deposition at 16, 42, 45-46, 58; A. 364, 373-375). On the basis of the entire record, the district court's finding of bloc voting by race in Rome cannot be said to be clearly erroneous, and should be upheld.

[20] In 1975, when it extended the operation of Section 5 for seven years, Congress specifically mentioned majority vote, numbered posts, and staggered terms as being among the devices used to reduce or eliminate the electoral gains made by black voters (H.R. Rep. No. 94-196, 94th Cong. 1st Sess. 10 (1975)). In *White* v. *Regester*, *supra*, 412 U.S. at 766, 767, this Court noted with approval the district court's finding that majority-vote and specified-place rules—neither improper nor invidious in themselves—enhanced the opportunity for racial discrimination.

> runoff election, in which, given bloc voting by race and a white majority, the black candidate would be at a severe disadvantage. Rev. Hill's Board of Education campaign exemplifies the dilutive effect on black voting strength of these rules: he would have been elected under the pre-1966 plurality-win system, but was defeated by the white candidate in the runoff election under the majority vote regime.[21]

In the typical Section 5 preclearance case, the Attorney General or district court is required to make a prediction as to the probable impact of the change on the electoral position of a particular group before the change has been effectuated. In this case, by contrast, Rome had operated for eight years under the 1966 amendments before they were submitted for preclearance, and conducted eight elections in that time.[22] Thus, the record before both the Attorney General and the district court presented data as to the actual operation of the challenged procedures. As the district court recognized, there could not have been a more graphic illustration of the dilutive impact of the 1966 changes than Rev. Hill's defeat in the 1970 school board contest. On that basis, invalidation of the 1966 charter amendments under Section 5 was mandated by this Court's holding in *Beer* v. *United*

[21] The court also concluded that the City had not met its burden of demonstrating that the numbered posts, staggered terms, and residency requirement for Board of Education elections would not have a racially discriminatory impact (J.S. App. 49b).

[22] The City conducted Board of Education elections in 1967, City Commission elections in 1968, and elections for both bodies in 1970, 1972, and 1974 (J.S. App. 1e; A. 71, 74-79).

States, supra, 425 U.S. at 141, that "the purpose of § 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." Retrogression had occurred because under the plurality-win system black voters in Rome had the potential to elect a candidate of their choice (as demonstrated by Rev. Hill's 1970 plurality prior to the runoff), and under the majority-win system that potential was substantially diminished—indeed, apparently eliminated. Accordingly, the district court's conclusion that the City failed in its burden of proving the absence of discriminatory effect was correct and should be affirmed.

Appellants claim that if the court had applied the criteria for determining dilution approved by the Court of Appeals for the Fifth Circuit in *Zimmer* v. *McKeithen,* 485 F.2d 1297 (1973) (en banc), aff'd on other grounds *sub nom. East Carroll Parrish School Board* v. *Marshall,* 424 U.S. 636 (1976), it would not have found the 1966 amendments to have a discriminatory impact (Br. 29-30). The *Zimmer* criteria, however, are addressed to the determination of a constitutional violation, rather than of the retrogression prohibited by the Voting Rights Act.[23] More-

[23] In *Zimmer* the court of appeals did not reach the Section 5 claim raised by the appellants (485 F.2d at 1302), because it concluded that the dilutive impact of the challenged apportionment scheme violated the Fifteenth Amendment (*id.* at 1307).

In a subsequent case, *Nevett* v. *Sides,* 571 F.2d 209, 222 (1978), petition for cert. pending, No. 78-492, the Fifth

over, the quotation from *Zimmer* in appellants' brief (Br. 30) omits the very factors that enhance the proof of dilution here (485 F.2d at 1305 (footnote omitted; emphasis added)):

> [W]here a minority can demonstrate a lack of access to the process of slating candidates, the unresponsiveness of legislators to their particularized interests, a tenuous state policy underlying the preference for multi-member or at large districting, or that the existence of past discrimination in general precludes the effective participation in the election system, a strong case is made. *Such proof is enhanced by a showing of the existence of large districts, majority vote requirements, anti-single shot voting provisions and the lack of provision for at-large candidates running from particular geographical subdistricts.*[24]

Circuit observed that since dilutive effect is established simply by a showing of racially polarized voting in an at-large system of elections, the factors enumerated in *Zimmer* are addressed to proving not *effect* but *purpose*. Thus their presence or absence here is not determinative of discriminatory impact. In fact, to the extent that *Zimmer* factors *are* present here, they call into question appellants' assertion and the district court's finding of an absence of invidious purpose. In any event, in affirming the result in *Zimmer*, this Court specifically declined to address the correctness of the constitutional views expressed by the court of appeals (*East Carroll Parish School Board* v. *Marshall*, *supra*, 424 U.S. at 638).

[24] The court of appeals in *Zimmer* also observed (485 F.2d at 1305) that under this Court's opinion in *White* v. *Regester*, *supra*, not all of these factors need be proved in order to make out a case of dilution sufficient to warrant relief.

Applying these criteria in the instant case, it appears that the state policy underlying the 1966 Rome charter amendments was "tenuous" at best. The majority vote requirement was first introduced by the City Attorney in the mistaken belief that state law required it (J.S. App. 47b); not only was there no such state requirement, but when the legislature enacted the Georgia Municipal Election Code in 1968 it allowed those cities with a plurality-win system to retain it (J.S. App. 1d-2d). As for the existence of "past discrimination" precluding "effective participation in the election system," that factor is evidenced by Georgia's status as a jurisdiction covered by Section 5, and the fact that only a small number of blacks in Rome were registered to vote until a voter registration campaign was launched in the 1960's to combat the perception that black votes were not being counted in city elections (A. 269-270). Most significant among the "*Zimmer*" factors present here is the 1966 change to a majority vote requirement, which, in combination with the pre-existing at-large scheme, has been demonstrated to dilute the voting strength of Rome's black citizens so that they are powerless to elect a candidate of their choice. In both *White* v. *Regester* and *Zimmer* itself, the majority vote requirement was critical in the court's finding of dilution.[25]

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[25] Appellants stress the absence of evidence that Rome's officials are insensitive to black interests (Br. 30 n.16), but such evidence was also lacking in *Zimmer* (485 F.2d at 1306), and the court of appeals and this Court nonetheless upheld the ultimate finding of dilution.

In sum, to the extent that *Zimmer* establishes the relevant criteria, see note 23, *supra*, reference to the *Zimmer* standards reinforces the conclusion that the district court correctly found dilution on the evidence presented here. Appellants' assertion to the contrary is predicated on an incomplete reading of *Zimmer* and should be rejected.

In considering the contested annexations, the district court properly applied the principles stated in *City of Petersburg* v. *United States*, *supra*, and in *City of Richmond* v. *United States*, *supra*. In *Richmond*, this Court quoted with approval language from *Petersburg* making it clear that an annexation could not be barred under Section 5 simply because it resulted in a population shift that increased the proportion of whites at the expense of blacks or even because it converted a black-majority city into a white-majority city. Such a prohibition, as the district court in *Petersburg* had explained, would mean that a city having a black majority surrounded by geographical areas in which whites were a majority "would be effectively locked into its original boundaries"—a result that Congress could hardly have intended. 354 F. Supp. at 1030, quoted in *City of Richmond* v. *United States*, *supra*, 422 U.S. at 369. The *Petersburg* annexation was nonetheless forbidden by Section 5 because of its effect on black voting strength considered in the context of existing electoral procedures. As this Court explained in *Richmond* (422 U.S. at 370):

> *Petersburg* was correctly decided. On the facts there presented, the annexation of an area with a white majority, combined with at-large councilmanic elections and racial voting, created or enhanced the power of the white majority to exclude Negroes totally from participation in the governing of the city through membership on the city council. We agreed, however, that that consequence would be satisfactorily obviated if at-large elections were replaced by a ward system of choosing councilmen. It is our view that a fairly designed ward plan in such circumstances would not only prevent the total exclusion of Negroes from membership on the council but would afford them representation reasonably equivalent to their political strength in the enlarged community.

Thus in the present case the district court acknowledged that "impact on black voting strength"—the simple calculation of the increases by number and percentage of registered voters among blacks and whites resulting from clearance of the annexations—was only the first part of its "effect" inquiry under Section 5. In making this threshold determination, the court looked at the cumulative effect of the annexations, considered "from the present perspective"—a reasonable procedure in view of the fact that the City had failed to submit each annexation for approval when it occurred and that the Act's purposes could be frustrated by permitting substantial diminutions of black voting strength simply because they took place through "piecemeal changes" (J.S. App. 53b). The court noted that in February 1978 the 13 con-

tested annexations—which took place at various times between 1965 and 1973 (A. 66) and which were not submitted to the Attorney General for preclearance until 1975—contained a registered voter total of 823 whites and 9 blacks (J.S. App. 53b). Since, according to the court's calculations, those 823 registered voters represented "close to 10%" of the City's registered white voters, whereas the 9 registered black voters in the annexed areas were a negligible portion of the black electorate, the court concluded that approving the annexations would have a sufficiently significant impact on black voting strength to warrant making the second part of the "effect" determination—the determination whether the black community would have "a fair opportunity to obtain representation reasonably commensurate with its post-annexation numerical strength" (*id.* at 54b).[26]

[26] The court's estimates were based on the assumption that the latest citywide totals for registered voters contained in the record—1975 figures showing a total of 10,982 white registered voters and 2,026 black registered voters (A. 58)—did not include persons living in the annexed areas. The court accordingly added the 1975 citywide figures to the 1978 figures for the annexed areas before calculating the percentage increases for whites and blacks. If one assumes, however, (1) that the 1975 citywide figures *included* persons in the annexed areas (because the City had carried through with its annexations despite lack of Section 5 preclearance and because the record does not indicate that the 1975 totals included less than all registered voters then on the rolls) and (2) that the population in the annexed areas did not change greatly between 1975 and 1978, then the 1978 annexed area figures should be directly compared with the 1975 figures. Under that analysis, the increase in white registered voters would be about 7.5%; the increase for blacks would still be about .4%. Using those same assumptions, and looking at the shift in racial composition of the electorate as a whole brought about by the annexations, yields a total of 13,008 registered voters in 1975 (after the annexations), consisting of 10,982 whites (84.4%) and 2,026 blacks (15.6%), compared with pre-annexation totals of 10,159 whites (83.4%) and 2,017 blacks (16.6%). The blacks thus lose one percent and the whites gain by the same amount, resulting in a total difference of two percent.

Obviously all of these calculations yield only estimates because the lack of clearly identified 1975 and 1978 figures for both the City as a whole and the annexed areas as a separate component makes it necessary to revert to inferences and predictions. Appellants (Br. 13-14 n.7) criticize the court's efforts to bridge the gaps, and, in particular, assert that the white registered voters in the annexed areas should not be considered new voters because they probably moved there from pre-annexation areas of the City. This argument ignores the question of the *present* impact of approving the annexations and, what is most important, ignores the fact that the burden was on appellants to prove lack of effect. If they had figures making possible a more accurate assessment of impact on black voting strength or supporting their contentions with respect to the original residence of the population in the annexed areas, it was incumbent on them to supply them. Having failed to submit evidence bearing on an issue as to which they have the burden of proof, they cannot now be heard to complain that inferences are drawn against them.

The court concluded that because of the features of the City's electoral system, and particularly those features as to which preclearance had been denied (see pages 30-36, *supra*), the black community did not have such an opportunity. As the court found, the increase in the number of registered white voters that would occur if the annexations were approved would simply reinforce "the discriminatory effect of

these voting rules," making it even more certain that the opportunity for blacks to elect a candidate of their choice would be blocked by the votes of the white majority (J.S. App. 54b). "Even under the pre-1966 rules," the court held (*ibid*), the effect of annexations would be to aggravate those features of the pre-1966 plan that had repeatedly lent themselves to frustrations of effective black participation in the electoral process (see Statement, *supra*, page 4 and note 2). Under *Petersburg* and *City of Richmond*, therefore, the court correctly held that the annexations should be precleared only if appropriate steps were taken to ameliorate their adverse effects on minority voting strength so that the electoral system will "fairly reflect[] the strength of the Negro community as it exists after the annexation" (*City of Richmond, supra*, 422 U.S. at 371).

This, of course, did not mean that the City was precluded from keeping these annexed areas. It meant only that if it wished to retain them, it should make such adjustments in its electoral system as would give black voters a fair opportunity for effective participation in the electoral process. Moreover, the City had more than one option open to it.

First, the City could have reverted to elections under its pre-1966 procedures (which did not include the objectionable features of majority-win requirements, numbered posts, and staggered terms), making only one minor adjustment—dropping its residency requirement for City Commission elections.[27] Although a geographical residency requirement can ameliorate dilution of the black vote in an at-large electoral system with a majority vote requirement (see, *e.g.*, *Zimmer* v. *McKeithen, supra*, 485 F.2d at 1305), it had had the opposite effect in the City's pre-1966 plurality-win system for electing nine commissioners from nine wards by reducing the number of potential candidates from any one of the nine wards, thereby promoting head-to-head contests in which racial bloc voting would guarantee the success of the white candidate. In that respect the residency requirement had functioned, and would again function, like a numbered post requirement. Because the elections would be more likely to result in two candidates from a given ward being pitted against each other, a plurality-win system would, in effect, be converted into a majority-win system, with racial bloc voting ordinarily guaranteeing victory to the white candidate.[28]

If the City wished to retain both a residency requirement and at-large elections, on the other hand, it could couple its pre-1966 procedures with its sub-

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[27] Because there was no such requirement for Board of Education elections under pre-1966 procedures, the Attorney General did not condition preclearance of the annexations on any change in Board of Education elections held under pre-1966 rules (J.S. App. 57b-58b; A. 160-161).

[28] It is conceivable that one or more of the nine wards might have contained no potential white candidates, thereby guaranteeing black representation, but appellants presented no evidence of this.

sequent shift to a system of electing three commissioners from each of three wards. (The Attorney General had not objected to the change from nine wards to three larger wards.) When candidates are running concurrently for three unnumbered positions in each of the three wards, without a majority-vote requirement, there can be no head-to-head contest, and single-shot voting by black voters would give them a chance to elect the candidate they supported.

Finally, the City could simply convert to a single-member district system, which, as this Court has recognized (*White* v. *Regester*, *supra*), may help to prevent the submergence of the vote of a racial minority. The district court hesitated to impose this as the sole condition on which the annexations might be approved, but it is certainly an option the City could voluntarily adopt if it preferred that to the other available means of ameliorating dilution. However, with no adjustments at all in the procedures for electing members of the City Commission, it cannot be said that black voters in a City that includes all the annexed areas will have "representation reasonably equivalent to their political strength in the enlarged community." *City of Richmond* v. *United States*, *supra*, 422 U.S. at 370. The district court accordingly did not err in denying preclearance of the 13 contested annexations.

II. SECTION 4(a) OF THE VOTING RIGHTS ACT DOES NOT PERMIT A MUNICIPALITY IN A STATE COVERED BY SECTIONS 4(a) AND 5 TO FILE AN INDEPENDENT ACTION TO EXEMPT ITSELF FROM COVERAGE OF THE ACT

Appellants next contend that the district court erred in holding that the Voting Rights Act does not permit the City individually to "bail out" from the coverage of Sections 4(a) and 5 of the Act (J.S. App. 17b-23b). This contention is contrary to the language and legislative history of the Act, and is without support in the opinions of this Court.

Section 4(a) prohibits the use of voting tests and devices (42 U.S.C. 1973b(a) (emphasis added))

> in any State with respect to which the determinations have been made under the first two sentences of subsection (b) of this section or in any political subdivision *with respect to which such determinations have been made as a separate unit*, unless the United States District Court for the District of Columbia in an action for a declaratory judgment brought by *such* State or *subdivision* against the United States has determined that no such test or device has been used during the seventeen years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color * * *.

Accordingly, the political entities authorized to file bail-out actions are those, and only those, to which the formula of Section 4(b) has been separately applied. The State of Georgia was determined to be

covered by Section 4(a) in 1965 (30 Fed. Reg. 9897 (1965)). The coverage formula of Section 4 (b) was never applied to the City "as a separate unit"; the prohibitions of Section 4(a) cover the City because it is part of a covered State—a fact that appellants concede (Br. 18 n.11). See *United States* v. *Board of Commissioners of Sheffield, Alabama*, 435 U.S. 110 (1978) (hereinafter "*Sheffield*"). Nothing in the Act allows the City to file an independent bail-out action; the bail-out action that would exempt the City must be filed by, and seek to exempt all of, the State of Georgia.

The legislative history of the Act supports the district court's conclusion on this question. The coverage formula of Section 4(b) was designed to limit the Act's most stringent remedies to those areas of the country where congressional investigation had disclosed the most prevalent and pervasive degree of racial discrimination in voting. See H.R. Rep. No. 439, 89th Cong., 1st Sess. 8, 12-14 (1965); S. Rep. No. 162 (Pt. 3), 89th Cong., 1st Sess. 13-16 (1965) (joint report of 12 members of the Judiciary Committee); see also *Sheffield*, *supra*, 435 U.S. at 119-120. In those areas, not only did Congress suspend the use of voting tests and devices used often in the past as tools of discrimination, but it also froze voting procedures and required the new procedures to be federally reviewed before they could be enforced. Congress did so because in those areas public officials had often devised new discriminatory voting schemes that would avoid the impact of court decisions in-

validating existing discriminatory practices (S. Rep. No. 162, *supra*, at 12; H.R. Rep. No. 91-397, *supra*, at 6-7; *South Carolina* v. *Katzenbach*, 383 U.S. 301, 335 (1966)).

Congress explicitly intended the strictures of the Act to apply to all parts of a State covered by Sections 4 and 5 of the Act until the State could establish that all discrimination caused by the use of tests and devices had ceased for a substantial period. Only then could the State exempt itself, and all parts of it, from the provisions of Sections 4 and 5. As the relevant House Report explains (H.R. Rep. No. 439, *supra*, at 14):

> This opportunity to obtain exemption is afforded only to those States or to those subdivisions as to which the formula has been determined to apply as a separate unit; subdivisions within a State which is covered by the formula are not afforded the opportunity for separate exemption.

And the Senate Committee's majority report similarly states (S. Rep. No. 162, *supra*, at 16):

> We are also of the view that an entire State covered by the test and device prohibition of section 4 must be able to lift the prohibition if any part of it is to be relieved from the requirements of section 4.

See also S. Rep. No. 162, *supra*, at 21.[29]

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[29] Appellants concede that if this Court is to accept their interpretation of Section 4(a), this legislative history "must or should be ignored" (Br. 45).

This scheme also reflects practical considerations with respect to the potential burden on the courts and litigants. The determination under Section 5 whether a particular change in procedures affecting voting can be said not to have either the proscribed purpose or the proscribed effect may be made either administratively, by the Attorney General, or in a suit heard by a three-judge court in the United States District Court for the District of Columbia, with direct appeal to this Court. The administrative option helps assure that the designated judicial forum will not be overloaded with Voting Rights Act litigation and that covered jurisdictions can secure approval of many unobjectionable changes without the burden of litigation. By contrast, the determination under Section 4(a) whether the designated covered jurisdictions meet the requirements for exemption from the Act's preclearance requirements may be made only by a three-judge court in the District of Columbia. This does not threaten an undue burden on that court if Section 4(a) is construed in accordance with what we have shown to have been the express intent of Congress. Under appellants' reading of the Act, however, the number of potential suits is extremely large. A survey made by the Civil Rights Division of the Department of Justice (Appendix, *infra*) indicates that in the nine states covered in their entirety alone there are approximately 7000 state and local government entities with the authority to make changes affecting voting. If even 10% of those entities decided to bring bail-out actions, the burden

on the district court in the District of Columbia would be overwhelming. The sensitivity of Congress to this problem in its drafting of Section 5 further confirms that it could not have intended the construction of Section 4(a) that appellants propose.

Appellants rely primarily on this Court's opinion in *Sheffield, supra*, in arguing that the City can independently bail out from coverage. *Sheffield*, however, said only that all political units within a State covered by Section 4(a) are required to preclear new voting procedures for Section 5 review even if those units do not register voters (435 U.S. at 135). As the Court explained, the scope of Sections 4(a) and 5 is "geographic" or "territorial" (*id.* at 120, 126), so that all political units within a covered State which deal in any way with the voting process are subject to the prohibitions of those sections. When an entire State is covered, the concept of what parts of it are "political subdivisions" has no relevance (*id.* at 126-129).

There was no occasion for the Court to discuss the bail-out provision in *Sheffield*, and it did not do so. *Sheffield* does, however, support the district court's analysis here, by making clear that Congress opposed any splintering of the Act's coverage of the practices of an entire covered State, since such fragmentation would require repeated litigation to safeguard minority rights, given the influence of State authorities over local election practices (435 U.S. at 125). The district court noted that fact (J.S. App. 21b-22b), as well as the potential risk that "covered States

could circumvent the purposes of the Act simply by causing their sub-jurisdictions that have successfully pursued a bail-out remedy to engage in discriminatory practices" (*id.* at 22b).[30]

In sum, the district court's conclusion that the Voting Rights Act does not permit a municipality such as the City of Rome to bail out independently from its requirements is solidly grounded in the language of the Act and its underlying purpose, as expressed in its legislative history and reflected in the decisions of this Court.

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[30] Section 5 is specifically addressed to covered states or separately covered jurisdictions that "*enact* or seek to administer" voting changes (42 U.S.C. 1973c) (emphasis supplied)). Here it is the State of Georgia—not the City of Rome—that enacted the 1966 charter amendments. Accordingly, the changes here at issue would still be subject to Section 5 even if the City had been successful in the bail-out aspects of its suit.

Moreover, since in Georgia only the state legislature may enact changes in the electoral procedures of municipalities (Ga. Code Ann. § 69-1018 (1976)), any future changes in such procedures for the City's elections—including any delegation of power to the City to write its own election laws—would be subject to Section 5 procedures. The district court's discernment of a risk that the State might nevertheless be able to subvert the purposes of the Act is reasonable, however, since it would be difficult to deny clearance to such a delegation of authority, in the absence of evidence of discriminatory purpose or of how the City would subsequently use such authority.

III. THIS COURT SHOULD ADHERE TO ITS PRIOR DECISIONS UPHOLDING THE CONSTITUTIONALITY OF SECTION 5 OF THE VOTING RIGHTS ACT AS A PROPER EXERCISE OF CONGRESS' POWER TO ENFORCE THE GUARANTEES OF THE FIFTEENTH AMENDMENT

Appellants raise two constitutional challenges to Section 5. First, they argue that in reaching electoral procedures and annexations enacted without invidious intent, it exceeds the scope of congressional power under the Fifteenth Amendment (Br. 46-68). Second, they claim that Section 5 is an unconstitutional intrusion on prerogatives properly belonging to the States and their citizens under the First, Fifth, Ninth, and Tenth Amendments (Br. 68-93). These challenges are essentially comprehended in "the basic question" this Court answered in *South Carolina* v. *Katzenbach*, 383 U.S. 301, 324 (1966): "Has Congress [in the Voting Rights Act of 1965] exercised its powers under the Fifteenth Amendment in an appropriate manner with relation to the States?" This Court held that Congress' exercise of power in enacting that statute was entirely appropriate, and subsequent decisions of this Court have reaffirmed that determination. In conformity with these decisions, Section 5 has been applied to many thousands of electoral changes since 1965.[31] Under familiar prin-

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[31] See, *e.g.*, S. Rep. No. 94-295, 94th Cong., 1st Sess. 16-17 (1975). Recent data collected by the Civil Rights Division of the Department of Justice indicates that the numbers of Section 5 submissions by covered jurisdictions in 1976, 1977, and 1978 were, respectively, 7,470, 4,007, and 4,675. From 1965 through June 30, 1979, 25,964 submissions were made.

ciples of *stare decisis*, only the weightiest of considerations should persuade this Court to overrule its settled and well-reasoned body of case law interpreting Section 2 of the Fifteenth Amendment and the Voting Rights Act. None of the arguments presented by appellants in support of their position warrants such a drastic departure from precedent, or, indeed, offers any substantial new ingredient for consideration. Accordingly, appellants' constitutional claims should be rejected.

A. Congress May, Through Section 5, Permissibly Proscribe Changes In Electoral Procedures Which Have The Effect Of Denying Or Abridging The Right To Vote On Account Of Race Or Color, Whether Or Not They Were Enacted With A Discriminatory Purpose

Appellants contend (Br. 46-67) that, even assuming the changes in electoral procedures at issue have racially discriminatory effects, Congress lacks the power under the Fifteenth Amendment to prohibit them where there is no proof of purposeful discrimination in their enactment. Acceptance of this contention would seriously undermine the Voting Rights Act—the remedial scheme that has proven to be the most effective mechanism in more than 100 years for enforcing the long unvindicated guarantees of the Fifteenth Amendment. For by creating in Section 5 of the Act a bar to the use in covered states of new electoral procedures having discriminatory effects, Congress employed its power under the Fifteenth Amendment to overcome the continuing effects of past discrimination, to prevent its recurrence, and to

prohibit conduct as to which a strong inference of invidious purpose exists. In any event, appellants' contention is inconsistent with decisions of this Court.

The contention rests on two premises: (1) that electoral procedures enacted and administered without invidious racial purpose on the part of government officials may, under no circumstances, be found to violate Section 1 of the Fifteenth Amendment (Br. 47-53) and (2) that Congress lacks the power under Section 2 of the Fifteenth Amendment to prohibit procedures that do not in themselves violate Section 1 (Br. 53-67). Both premises are essential to appellants' argument. Thus, although we argue below (pages 59-62, *infra*) that at least those election procedures that enhance the power of private discrimination to exclude blacks from meaningful participation in the electoral process are unconstitutional under Section 1 of the Fifteenth Amendment, this Court need not reach that contention if it agrees with our primary submission, namely that Congress may prohibit such procedures under Section 2, whether or not they are, in themselves, constitutional violations.

1. *In exercising its power under Section 2 of the Fifteenth Amendment to enforce the guarantees of Section 1, Congress may proscribe procedures with respect to voting that have discriminatory effects, whether or not those procedures are judicially determined to constitute violations of Section 1*

Section 1 of the Fifteenth Amendment guarantees that "[t]he right of the citizens of the United States to vote shall not be denied or abridged by the United

States or any state on account of race, color, or previous condition of servitude." As this Court observed in *South Carolina* v. *Katzenbach*, *supra*, 383 U.S. at 325, it is settled law that this guarantee is self-executing. If Congress, in enacting legislation pursuant to its powers under Section 2 "to enforce this article by appropriate legislation," were confined to prohibiting those practices that a court would determine violative of Section 1, it would be confined to doing (through the provision of alternative remedies, for example) what the enacters of the Amendment have already accomplished in Section 1. The decisions of this Court counsel that Congress is not so confined in exercising its powers under Section 2.

The seminal case defining the power of Congress to effectuate the guarantees of the Civil Rights Amendments, *Ex parte Virginia*, 100 U.S. 339 (1879), concerned the exercise of power under the Enforcement Clause (Section 5) of the Fourteenth Amendment; but this Court made it clear in *South Carolina* v. *Katzenbach*, *supra*, 383 U.S. at 326-327, that the powers of Congress under Section 2 of the Fifteenth Amendment, are no less broad. Thus the power available to Congress for the effectuation of Fifteenth Amendment rights is properly defined in the following words from *Ex parte Virginia*, *supra*, 100 U.S. at 345-346:

> Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.

More specifically, in *South Carolina* v. *Katzenbach*, *supra*, 383 U.S. at 333-334, this Court rejected the contention that because it had previously held, in *Lassiter* v. *Northampton County Board of Elections*, 360 U.S. 45 (1959), that literacy tests are not *per se* violations of the Fifteenth Amendment, Congress is not empowered under Section 2 of the Amendment to compel states to suspend their use of such devices for a given period. Indeed, the very fact that the Court in *South Carolina* v. *Katzenbach* found it unnecessary to overrule *Lassiter* is largely dispositive of appellants' constitutional claims.[32] As this Court explained, 383 U.S. at 334, "Congress knew that continuance of the tests and devices in use at the present time, no matter how fairly administered in the future, would freeze the effect of past discrimination in favor of unqualified white registrants." Thus a state or municipality covered by Section 4 of the Voting Rights Act of 1965, 42 U.S.C. 1973b, could be forbidden to use a voting registration test even though it was fairly administered and had not been

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[32] The Court observed that the record showed that "in *most of the States* covered by the Act, including South Carolina, various tests and devices have been instituted with the purpose of disenfranchising Negroes * * *." 383 U.S. at 333 (emphasis added).

judicially determined to have been enacted with a discriminatory purpose. Significantly, the Act's coverage formula was designed to focus its applicability on areas where there was strong reason for a legislative presumption that substantial effects of intentional discrimination in violation of Section 1 of the Fifteenth Amendment persisted. Accordingly, even though the prohibited use of a test or device, or the prohibited change in electoral procedures, may not in themselves have been adopted with discriminatory purpose, their prohibition is an appropriate legislative means of preventing perpetuation of the effects of a pervasive pattern of intentional discrimination —and thus an appropriate exercise of the congressional power to enforce the guarantees of the Fifteenth Amendment. See also *Gaston County* v. *United States*, 395 U.S. 285 (1969).

Similarly, in *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966), in considering a challenge to Section 4(e) of the Voting Rights Act of 1965, 42 U.S.C. 1973b (e), which prohibited enforcement of a New York law making literacy in English a prerequisite for voting even for those New York residents from Puerto Rico who had completed six grades in an accredited Spanish-language Puerto Rican school, this Court held that Congress had properly used its powers under Section 5 of the Fourteenth Amendment in enacting Section 4(e) of the Act. The Court expressly rejected the contention that Section 4(e) "cannot be sustained as appropriate legislation to enforce the Equal Protection Clause unless the judi-

ciary decides—even with the guidance of a congressional judgment—that the application of the English literacy requirement prohibited by § 4(e) is forbidden by the Equal Protection Clause itself" (384 U.S. at 648). It was sufficient, the Court held, that a rational basis could be discerned for a congressional judgment that this prohibition was "a means of dealing with the evil" at which the Equal Protection Clause was aimed. *Id.* at 653. See also *Everard's Breweries* v. *Day*, 265 U.S. 545, 558-560 (1924) (Eighteenth Amendment).

More recently, in *Oregon* v. *Mitchell*, 400 U.S. 112 (1970), this point has been reaffirmed in a context where the nexus of the legislative remedy with perpetuation of purposeful discrimination was considerably more attenuated than it is here. In one of several cases consolidated with the Oregon case, this Court unanimously rejected a challenge by the State of Arizona to the constitutionality of Section 201 of the Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 315, which imposed a five-year nationwide ban on literacy tests and similar requirements for registering to vote in state or federal elections. Arizona contended that neither its voting requirements nor its educational system, which—if discriminatory—might have made fairly enacted and administered tests discriminatory in effect, had been shown to discriminate against persons on the basis of race or color; and it argued that Congress had acted beyond its powers in enacting a law that would reach such voting requirements. *Oregon* v. *Mitchell, supra*, 400 U.S. at 233.

There was no single opinion for the Court, and Mr. Justice Douglas based his rejection of Arizona's challenge on the power of Congress, under Section 5 of the Fourteenth Amendment, to enforce the Equal Protection Clause. *Id.* at 144-147. In four separate opinions, the remaining eight Members of the Court, however, expressed the view that Congress had acted within its powers under Section 2 of the Fifteenth Amendment in enacting the ban. Mr. Justice Black noted that Congress could have decided that "discriminatory educational opportunities in both the North and the South," together with evidence that literacy tests "reduce voter participation in a discriminatory manner," warranted such a general prohibition as a means of enforcing the Fifteenth Amendment. *Id.* at 133. In a joint opinion, Justices Brennan, White, and Marshall noted that they did not question Arizona's claim that its own educational system had never been operated in a discriminatory manner, but they nonetheless found that Congress could prohibit Arizona's use of literacy requirements for voting because such requirements might reasonably be judged to perpetuate the effects of racial discrimination in schools elsewhere, where some of Arizona's potential voters had been educated. *Id.* at 233-234. Mr. Justice Stewart, joined by the Chief Justice and Mr. Justice Blackmun, noted by reference to *Lassiter* v. *Northampton County Board of Elections*, *supra*, and *Gaston County* v. *United States*, *supra*, that Congress has authority under section 2 of the Fifteenth Amendment to proscribe literacy tests that perpetuate the effects of past discrimination even though such tests

might survive a direct constitutional challenge under the Fifteenth Amendment. *Id.* at 293. Finally, Mr. Justice Harlan observed (400 U.S. at 216; footnote omitted):

> Despite the lack of evidence of specific instances of discriminatory application or effect, Congress could have determined that racial prejudice is prevalent throughout the Nation, and that literacy tests unduly lend themselves to discriminatory application either conscious or unconscious. This danger of violation of § 1 of the Fifteenth Amendment was sufficient to authorize the exercise of congressional power under § 2.

Just as literacy tests may "lend themselves" to discriminatory application, so changes in electoral procedures that enhance the power of a racial majority in a given community to deprive members of a racial minority in that community of any realistic opportunity to elect the candidates they support "lend themselves" to discrimination. Congress could rationally conclude that assuring protection of Fifteenth Amendment rights in areas with a history of racial discrimination in matters pertaining to voting, required, for a limited time, a prohibition on the use of procedures such as these that have a racially discriminatory impact, whether or not invidious racial purpose, or lack thereof, in their enactment may be demonstrated in each particular case.[33] In enacting a

[33] As the district court pointed out, "the frequent lack of state legislative histories and the unreliability of other means of ascertaining legislative intent" would make it particularly onerous to have to investigate purpose in order to preclear

limited extension of the Voting Rights Act in 1975, Congress took note of the fact that although much progress had been made during the preceding decade in which the Act had been in effect, that progress had been "modest and spotty" and that the "continuing need for this preclearance mechanism" was evidenced by the fact that "[a]s registration and voting of minority citizens increases, other measures may be resorted to which would dilute increasing minority voting strength." S. Rep. No. 94-295, 94th Cong., 1st Sess. 15, 16 (1975); H.R. Rep. No. 94-196, 94th Cong., 1st Sess. 7, 10 (1975). Among the electoral changes having such effects, it mentioned annexations of predominantly white areas and the imposition of majority vote requirements and staggered terms. S. Rep. No. 94-295, *supra*, at 16-17; H.R. Rep. No. 94-196, *supra*, at 10.

Section 5 as construed to prohibit the use of such new procedures thus serves the congressional purpose,

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voting changes under Section 5 (J.S. App. 36b). The court's equation of the "effect" standard in Section 5 with an "irrebutable presumption" of invidious intent (*ibid.*) is unnecessary in light of Mr. Justice Harlan's theory that Congress may prohibit practices as to which there is a "risk" that they will violate Section 1 of the Fifteenth Amendment (*Oregon* v. *Mitchell*, *supra*, 400 U.S. at 216); but, in any event, such a presumption is not in itself unconstitutional as appellants suggest (Br. 27). This Court rejected a similar argument in *South Carolina* v. *Katzenbach*, *supra*, 383 U.S. at 330. And it has frequently recognized the need for legislatures to create classifications based on presumptions even where those classifications are imperfect. See, *e.g.*, *Massachusetts Board of Retirement* v. *Murgia*, 427 U.S. 307, 316 (1976); *Weinberger* v. *Salfi*, 422 U.S. 749, 771-773 (1975).

described approvingly by this Court in *Beer* v. *United States*, 425 U.S. 130, 140 (1976), of "prevent[ing] States from 'undo[ing] or defeat[ing] the rights recently won' by Negroes." As this Court held in *Beer*, effectuating that purpose required that "no voting-procedure changes * * * be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise" (*id.* at 141). If a separate inquiry into invidious intent were constitutionally required for every Section 5 preclearance, it would be impossible to achieve that goal of preventing retrogression and Congress would be severely disabled from securing the guarantees of the Fifteenth Amendment to members of groups long denied them.

2. *The Fifteenth Amendment prohibits electoral procedures enacted without official intent to discriminate that have the effect of enhancing purposeful private discrimination*

Appellants urge (Br. 47-53) that proof of a violation of the Fifteenth Amendment requires a showing of invidious purpose as well as of discriminatory effect. This Court has not specifically so held, although such an interpretation is consistent with its decisions under the Fifteenth Amendment, in most of which official discriminatory purpose has been "painfully apparent" (*Nevett* v. *Sides*, 571 F.2d 209, 220 (5th Cir. 1978), petition for cert. pending, No. 78-492). See, *e.g.*, *Guinn* v. *United States*, 238 U.S. 347 (1915); *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960); *Alabama* v. *United States*, 371 U.S. 37, aff'g

304 F.2d 583 (5th Cir. 1962). Even if the Court chooses, however, to reach the question whether the changes at issue in this case violate the Fifteenth Amendment, it need not decide whether a Fifteenth Amendment violation may be shown without demonstrating that the official action at issue is linked to purposeful racial discrimination. The changes at issue here enhance the power of purposeful private discrimination to exclude blacks from effective participation in the electoral process. Construing the Fifteenth Amendment to prohibit such official action is consistent with decisions of this Court.[34]

At least two decisions of this Court suggest that the element of purpose is present where the official action with respect to voting, although itself under-

[34] Although, as stated, the Court need not decide whether official action may be found to violate the Fifteenth Amendment on the basis of discriminatory effect alone, we note that the language of the Fifteenth Amendment—in particular its reference to denial or abridgement of the vote "on account of race, color, or previous condition of servitude"—resembles recent civil rights legislation prohibiting discrimination in specific types of activity. Phrases such as "because of race" or "on the ground of race" appearing in civil rights statutes have been held not to require a showing of specific racial impetus for measures that perpetuate or enhance the effects of earlier discrimination. *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 429-430 (1971); *Metropolitan Housing Development Corp.* v. *Village of Arlington Heights*, 558 F.2d 1283, 1289-1290 (7th Cir. 1977), cert. denied, 434 U.S. 1025 (1978) (*"Arlington Heights II"*). Thus, reading Section 1 of the Fifteenth Amendment to prohibit the implementation of measures having a racially disparate impact on the ability of racial minorities to participate fully and effectively in the electoral process would not unduly strain the language of the Amendment.

taken with benign purpose, interacts with purposeful private discrimination to accomplish a discriminatory result. In *Smith* v. *Allwright*, 321 U.S. 649 (1944), the Court reviewed a Fifteenth Amendment challenge to facially neutral state election laws that limited candidacy in the general election to the victors in authorized primaries—among them the state Democratic primary, in which blacks were denied the right to vote. The Court concluded that the state election laws effectively endorsed private discrimination by the political party, observing that the right to vote may not be "nullified by a State through casting its electoral process in a form which permits a private organization to practice racial discrimination in the election" (321 U.S. at 664).

In *Terry* v. *Adams*, 345 U.S. 461 (1953), the Court struck down as violative of the Fifteenth Amendment a system in a Texas county by which a racially exclusive private club preselected candidates prior to the state-wide primary; whites then voted as a bloc and their candidate "invariably" won in the primary and subsequent general election (345 U.S. at 483 (opinion of Clark, J.)). While the eight Justices who agreed that this arrangement contravened the Fifteenth Amendment reached that result by somewhat different routes,[35] the unifying principle to be gleaned from the case is that state election procedures may not create an opportunity for racial

[35] Mr. Justice Black wrote for himself and Justices Douglas and Burton; Mr. Justice Frankfurter concurred separately; and Mr. Justice Clark wrote for himself, the Chief Justice, and Justices Reed and Jackson.

bloc voting to operate in a way that effectively denies black voters meaningful participation in the electoral process.

Thus, decisions of this Court recognize that electoral procedures that allow private intentional discrimination to abridge the voting rights of black citizens are contrary to the guarantees of the Fifteenth Amendment.[36] Because the 1966 City Charter amendments and the annexations at issue create the opportunity for such private discrimination to prevent blacks from fully participating in the electoral process (see pages 28-42, *supra*), the Fifteenth Amendment prohibits their implementation.

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[36] *James* v. *Bowman*, 190 U.S. 127 (1903); *United States* v. *Harris*, 106 U.S. 629 (1882); and *United States* v. *Reese*, 92 U.S. 214 (1875), of course predate *Smith* v. *Allwright*, *supra*, and *Terry* v. *Adams*, *supra*, and thus provide no support for attacking the principle embodied in *Smith* and *Terry*. In any event, their holdings are not contrary to our reading of the two later cases. The conduct punished under the statute at issue in *Harris* did not relate to voting, and the passage quoted from *Harris* by appellants (Br. 57-58) simply relied on *Reese*. In *Reese*, the Court found the statute in question beyond the power of Congress because it appeared to reach any "wrongful" interference "to prevent the exercise of the elective franchise without regard to * * * discrimination [on account of race, color, or previous condition of servitude]." 92 U.S. at 220. In *James*, the Court struck down a statute that imposed criminal penalties on private citizens without reference to any state action. The Court held that a "statute which purports to punish *purely* individual action cannot be sustained as an appropriate exercise of the power conferred by the Fifteenth Amendment upon Congress." 190 U.S. at 139 (emphasis added).

B. Section 5 Is Not An Unconstitutional Infringement Of Rights Guaranteed To The States Or Private Citizens Under The First, Fifth, Ninth, And Tenth Amendments

Appellants and the State of Mississippi as *amicus curiae* attempt to revive contentions rejected by this Court in *South Carolina* v. *Katzenbach*, *supra*, in arguing that Section 5 of the Voting Rights Act of 1965 is unconstitutional because it violates principles of federalism.

The power granted to Congress under Section 2 of the Fifteenth Amendment to enforce the provisions of Section 1 necessarily permits it to limit the authority of a state over voting and election procedures when the state's action may encroach upon rights guaranteed by that Amendment. *South Carolina* v. *Katzenbach*, *supra*, 383 U.S. at 325; *Ex parte Virginia*, *supra*, 100 U.S. at 346-348. This Court has consistently recognized that the Civil War Amendments changed principles of state sovereignty reflected in the Tenth and Eleventh Amendments, and has upheld congressional action that, in the course of enforcing the Civil War Amendments, has intruded into "spheres of autonomy previously reserved to the States" (*Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 455 (1976), citing *South Carolina* v. *Katzenbach*, *supra*, and *Mitchum* v. *Foster*, 407 U.S. 225 (1972)). See *Ex parte Virginia*, *supra*, 100 U.S. at 346-348. Speaking of the permissible reach of the Fourteenth Amendment in regulating state action, the Court used language in *Fitzpatrick*, *supra*, that applies with

equal force to the scope of the Fifteenth Amendment (427 U.S. at 456):

> When Congress acts pursuant to § 5 [of the Fourteenth Amendment], not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority. We think that Congress may, in determining what is "appropriate legislation" for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for * * * suits against States or state officials which are constitutionally impermissible in other contexts.

Appellants (Br. 74-75) and the State of Mississippi (Miss. Br. 9, 21) rely heavily on *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), a case that concerned the extension of federal wage and hour regulations to state and local governments. As the district court noted (J.S. App. 38b), however, the holding of *National League of Cities* is carefully limited to regulations enacted under the Commerce Clause (426 U.S. at 851-852), and, significantly, the Court expressed no opinion as to "whether different results might obtain if Congress seeks to affect integral operations of state governments by exercising authority granted it under other sections of the Constitution such as * * * § 5 of the Fourteenth Amendment" (*id.* at 852 n.17).

The distinction between the power of Congress under the Commerce Clause and its power under the

Civil War Amendments rests on the nature of the constitutional grant involved. The power to regulate interstate commerce is the power "to prescribe the rule by which commerce is to be governed" (*Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 196 (1824)), and necessarily embraces the enactment of laws regulating individual conduct that is subject to both state and federal sovereignty (*National League of Cities*, *supra*, 426 U.S. at 845). A more exclusive grant of authority is conferred by the Fourteenth and Fifteenth Amendments, which directly prohibit certain activities by the States and further authorize Congress to enact appropriate legislation for their enforcement. Unlike the Commerce Clause, those amendments "were intended to be, what they really are, limitations of the power of the States and enlargements of the power of Congress." *Ex parte Virginia*, *supra*, 100 U.S. at 345. What Congress is authorized to enforce are prohibitions directed to the States that restrict state power. As this Court expressly stated in *South Carolina* v. *Katzenbach*, *supra*, 383 U.S. at 324, 325:

> As against the reserved powers of the States, Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting.
>
> * * * The gist of the matter is that the Fifteenth Amendment supersedes contrary exertions of state power.

South Carolina v. *Katzenbach* and *Fitzpatrick* v. *Bitzer*, rather than *National League of Cities*, thus provide the pertinent guidance concerning the power

of Congress to regulate state conduct under the Fifteenth Amendment. See also *Firefighters Institute for Racial Equality* v. *City of St. Louis*, 549 F.2d 506, 510 n.5 (8th Cir.), cert. denied *sub nom. City of St. Louis* v. *United States*, 434 U.S. 819 (1977); *Blake* v. *City of Los Angeles*, 595 F.2d 1367, 1373 (9th Cir. 1979), petition for cert. pending, No. 79-54.

Appellants urge that the Voting Rights Act has outlived its usefulness because the "emergency conditions" that prompted its passage no longer obtain, and that its intrusion into state and local regulation of voting procedures can therefore no longer be justified (Br. 71-73). But while it cannot be denied that dramatic improvements were made between 1964 and 1975 in black access to the electoral process (Br. 73 n.64), that success is directly attributable to the Voting Rights Act, and Congress found sufficient discrimination remaining in 1975 to warrant extending the operation of the Act for seven additional years. See H.R. Rep. No. 94-196, *supra*, at 7-11. Moreover, the determination of when the protections of the Act should be permitted to lapse is peculiarly within the expertise of Congress, armed with information from the Department of Justice and other sources concerning enforcement experience under the Act. The argument by appellants and the State of Mississippi that this Court, rather than Congress, should decide the lifespan of the Voting Rights Act is contrary to this Court's well-settled and salutary practice of deferring to the legislative judgment in such matters. See, *e.g.*, *South Carolina* v. *Katzenbach*, *supra*, 383 U.S. at 308-315.

Appellants also contend that Section 5 is unconstitutional because compliance with it is "intrusive and burdensome" (Br. 79-82) and because it subjects the States to government by the Attorney General's "administrative fiat" (Br. 82-83) and imposes "political orthodoxy" on covered jurisdictions (Br. 83-84). Similar claims were raised in *South Carolina* v. *Katzenbach*, *supra*, and were rejected by this Court. Appellants have offered no substantial reason for this Court to reconsider such contentions.

Finally, the individual appellants claim that their First, Fifth, Ninth, and Tenth Amendment rights as private citizens have been abridged because no elections have been conducted in Rome since 1974 (Br. 84-89). But Section 5 neither prevents municipalities from holding elections nor restricts private expression of speech protected by the First Amendment. Section 5 helps to insure that when elections are held, members of any particular racial group will not be deprived of an opportunity for full participation, and no person's participation will be limited on racial grounds. It thus infringes no cognizable right of the individual appellants.

In any event, the district court correctly found that the City's delay in holding municipal elections is self-imposed (J.S. App. 43b). Section 5, by its terms, contemplates that when proposed election changes are not precleared, existing procedures remain in effect, and elections are governed by, and should be held under, those procedures. Following the Attorney General's refusal to preclear the 1966

changes, the City could still have conducted elections under pre-existing law—indeed it was obligated by Georgia law to do so.[37] Instead, it decided to allow the incumbents to remain in office indefinitely throughout the pendency of this suit. It is the appellant officials who are responsible for seeing to it that elections are conducted; the failure to hold elections is not the fault of the Attorney General or the district court.[38]

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[37] The law existing on November 1, 1964, which continued in effect when preclearance was denied, required city commissioners and school board members to be elected every four years (1918 Ga. Laws 818, 861). However, when the City's Section 5 submission did not succeed, the City failed to comply with this obligation and did not conduct new elections.

[38] Appellants argue (Br. 85-86) that while other changes failed, the reduction of wards from nine to three was precleared, and that since the old law, which established nine wards and nine commissioners, was still in effect, the new law effectively reduced the number of commissioners from nine to three. A three-man commission, they argue, could not govern, given the requirement of five for a quorum. In fact, the new three-ward system established that three commissioners were to be elected from each ward. Since the Attorney General could not and did not object to the requirement that each commissioner reside within the ward from which he was elected, the City could still have elected nine commissioners, three from each ward, as long as the features to which the Attorney General had objected—majority vote, staggered terms, numbered posts—were not implemented. (Although the Attorney General objected to the annexations in the context of at-large elections with a residency requirement (see pages 12-13, and note 14, *supra*), the residency requirement itself did not run afoul of Section 5 because its enactment predated the Voting Rights Act.) In other words, an election for a nine-member city commission readily could have been conducted under the effective portions of pre- and post-1964 law—*i.e.*, three members from each ward, elected at-large by plurality vote. Under effective parts of the election code a Board of Education election could have been held to choose two members from each ward, at-large, by plurality vote. If the City believed all new changes were "inextricably interwoven" (Plaintiffs' Motion for Interim Relief 2), and therefore ineffective if not precleared together, it could have relied entirely on pre-1964 procedures for new elections.

The City also contends it could not have held those elections because to do so would have cut short the staggered terms of some officials elected in previous elections. Those officials were in fact elected in violation of Section 5; when preclearance was not secured, new elections could have been held reverting to old, concurrent terms. *Berry* v. *Doles*, 438 U.S. 190, 193 (1978). Although the Attorney General offered to preclear quickly any technical changes necessary to permit the City to conduct elections under existing effective procedures (J.S. App. 43b), the City did not pursue this possibility (*ibid.*).

IV. THE DISTRICT COURT CORRECTLY CONCLUDED THAT THE ELECTORAL CHANGES AND ANNEXATIONS AT ISSUE HERE HAVE NOT BEEN PRECLEARED BY THE ATTORNEY GENERAL

A. The Electoral Changes Were Not Precleared In 1968

Appellants argue (Br. 90-93) that the 1968 preclearance of the Georgia Municipal Election Code, Title 34A of the Code of Georgia, effectively precleared the 1966 changes to the City's charter. The district court correctly rejected that argument (J.S. App. 23b). In its 1968 submission, the State did not "submit" the changes as they applied to the City of Rome. There was no explanation of how, or even

whether, the City's procedures were changed. In order to "submit" a new procedure, the change must be clearly explained to the Attorney General, 28 C.F.R. 51.10; he cannot reasonably be held to be put on notice of the election procedures for every municipality when an act with statewide effect is submitted. As this Court held in *United States* v. *Board of Commissioners of Sheffield, Alabama*, 435 U.S. 110, 137-138 (1978), preclearance cannot occur until the particular change has been submitted to the Attorney General and he has been afforded an opportunity to assess its purpose and its effect on minority voting in *that* jurisdiction.

In any event, the 1968 Municipal Election Code made no actual change in the City's procedures. The 1968 law gave municipalities the option to create numbered post and majority vote requirements (J.S. App. 1d). Since those provisions did not require the adoption of either, they did not change the City's procedures.[39]

B. The Attorney General Did Not Effectively Preclear The Changes By An Untimely Response To A Request For Reconsideration

Appellants also contend (Br. 93-96) that the Attorney General's response to the City's May 24, 1976,

[39] The relevant Code section (Ga. Code Ann. § 34A-1407 (1970)) provided that unless a municipality's charter "as now existing or as amended subsequent" to the Act required plurality voting, majority-vote elections should be used. In 1968, the City's charter still required plurality voting; the 1966 change to majority voting had not been precleared and was therefore ineffective.

letter requesting that he reconsider his objections to the electoral changes was late and that the Attorney General thereby in effect gave his approval to the submission upon reconsideration. This argument rests on a challenge to the Attorney General's reasonable construction of his own regulations with respect to time limitations on consideration of requests for reconsideration of objections interposed under Section 5.

In *Georgia* v. *United States*, 411 U.S. 526, 541 (1973), this Court approved, as "wholly reasonable and consistent with the Act," the Attorney General's regulation (28 C.F.R. 51.18(a)) providing that the statutory 60-day period for initial consideration of a Section 5 submission (42 U.S.C. 1973c) is tolled when the Attorney General finds it necessary to request additional information from the submitting authority and that the period starts anew when he receives the requested information. Appellants' contention concerns not that statutory period for initial review of a Section 5 submission but rather a 60-day period the Attorney General has imposed upon himself for reconsideration, at the behest of a submitting authority, of an objection he has timely interposed (28 C.F.R. 51.3(d), 51.24). Appellants contend that that 60-day period should run from the date of its initial request on May 24, 1976, but the Attorney General computed the time as running from July 14, 1976, when the City voluntarily supplemented its request with two additional affidavits. The Attorney General declined to withdraw his objection on August 12,

1976, within 60 days of the latter submission but not of the former.[40]

As the district court correctly held (J.S. App. 27b-28b), it was reasonable for the Attorney General to treat this situation by analogy to that in which a submitting authority sends additional information at the Attorney General's request and to restart the period upon receipt of the additional material. This holding does not give the Attorney General unlimited or unfair power to delay decisions on Section 5 submissions since the rule applies only (1) when a submitting authority, having received a timely decision on its submission, chooses to seek reconsideration of that decision and (2) when that authority decides to submit the evidence bearing on the reconsideration decision in a piecemeal fashion. The contrary rule for which appellants contend would substantially impair the reconsideration process, since it would permit jurisdictions to submit additional material late in the 60-day period, when it could not be properly assessed for lack of time.[41] Since appellants volun-

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[40] As appellants point out (Br. 94), those regulations provide for an additional 15 days for considering requests for reconsideration following a conference held at the submitting authority's request, but are silent as to the effect of an authority's uninvited submission of additional material for the Attorney General to examine before making his decision on reconsideration, such as occurred here.

[41] *Garcia* v. *Uvalde County*, 455 F.Supp. 101 (W.D. Tex. 1978) (three-judge court), aff'd mem., No. 78-580 (Jan. 8, 1979), is not to the contrary. That case concerned "repeated requests for additional information" (455 F.Supp. at 104), by each of which the Attorney General sought to postpone the start of the statutory 60-day period for consideration of Section 5 submissions. The district court held only that once the Attorney General has received from the submitting authority a response to his first request for additional information and the submission is complete according to his regulations, he may not further postpone the start of the 60-day period by making additional requests. 455 F.Supp. at 106.

tarily chose to supplement their submission for reconsideration, they should not be heard to claim that the Attorney General erred in treating their unsupplemented submission as incomplete and their supplemental submission as entitled to full consideration under the regulation.

In any event, even if the Attorney General had not timely complied with the regulations governing requests for reconsideration, the effect would not have been to preclear the proposed changes. The regulations provide that within 60 days of the request he will "decide" and will notify the requesting authority "of his decision to continue or withdraw an objection," but they do not state that the objection will be deemed withdrawn if he does not act on the request within 60 days.[42] The Act, of course, specifies

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[42] 28 C.F.R. 51.3(d) provides:

> When the Attorney General objects to a submitted change affecting voting, and the submitting authority seeking reconsideration of the objection brings additional information to the attention of the Attorney General, the Attorney General shall decide within 60 days of receipt of a request for reconsideration (provided that he shall have at least 15 days following a conference held at the

that the proposed changes cannot take effect unless precleared, and the Attorney General's objection here was concededly interposed during the 60-day statutory time period. That objection remained in effect unless and until it was withdrawn. A failure by the Attorney General to respond to appellants' request for such withdrawal within the time prescribed by the regulations might have entitled appellants to seek a court order requiring prompt consideration by him of their request, but there is no basis for holding that it would have abrogated the protections of the Act. Nor would there have been occasion for the district court in the present proceeding to afford collateral relief. Cf. *Morris* v. *Gressette*, 432 U.S. 491 (1977).

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submitting authority's request) whether to withdraw or to continue his objection.

28 C.F.R. 51.24 provides:

> An objection shall be withdrawn if the submitting authority can produce information not previously available to it which satisfies the Attorney General that the change does not have a racially discriminatory purpose or effect. The Attorney General shall notify the submitting authority within 60 days of the request for reconsideration (provided that the Attorney General shall have at least 15 days following any conference that is held in which to decide) of his decision to continue or withdraw an objection, giving the reasons for his decision. A copy of the notification shall be sent to any party that has commented on the submission or has requested notice of the Attorney General's action thereon.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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APPENDIX

The Civil Rights Division of the Department of Justice has surveyed the nine states covered in their entirety under the Voting Rights Act to determine the total number of counties, municipalities, and specialized units of government (*e.g.*, school districts) in those states that have authority to make changes in election procedures or carry out activities within the purview of Section 5.[1] Reproduced below is a table showing the totals for each of those states.[2]

State	Counties	Municipal Govt's	Other
Ala.	67	410	166
Alas.	11	112	51
Ariz.	14	70	236
Ga.	159	530	188
La.	64	299	66
Miss.	82	283	153
S.C.	46	264	92
Tex.	254	1066	2109
Va.	96	229	170
Total:	793	3263	3231

GRAND TOTAL: 7,287

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[1] Alaska and Arizona are covered under the formula added by Title II of the 1975 amendments to the Voting Rights Act, Pub. L. No. 94-73, 89 Stat. 400 *et seq.*

[2] The figures were derived from U.S. Census data and from telephone interviews with state government officials in these states and Dr. Vance Grant, Chief of the Statistical Information Center, National Center for Education Statistics, Department of Health, Education and Welfare.

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